

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

OCT 27 2006

Federal Communications Commission
Office of the Secretary

In the Matter of

DOCKET FILE COPY ORIGINAL

ORIGINAL

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.

(Ione, Oregon; Walla Walla, Washington and
Athena, Hermiston, La Grande, and Arlington,
Oregon)

MB Docket No. 05-9

RM-11141

RM-11242

(Monument, Oregon; Prairie City, Prineville, and
Sisters, Oregon and Weiser, Idaho; The Dalles
Tualatin, Eugene, Albany, Lebanon, Paisley, and
Diamond Lake, Oregon and Goldendale,
Washington)

MB Docket No. 05-10

RM-11140

RM-11241

RM-11279

To: Office of the Secretary

Attn: Chief, Audio Division, Media Bureau

PETITION FOR RECONSIDERATION

Portland Broadcasting, LLC, licensee of Station KXPC-FM, Lebanon, Oregon, Columbia
Gorge Broadcasters, Inc., licensee of Station KACI-FM, The Dalles, Oregon, M.S.W.
Communications, LLC, licensee of Station KMSW(FM), The Dalles, Oregon and Extra Mile
Media, Inc., licensee of Station KHPE(FM), Albany, Oregon (collectively, the "Joint
Petitioners") hereby file a Petition for Reconsideration of the *Report and Order* ("R&O"),
released September 5, 2006 (DA 06-1759), 71 Fed. Reg. 56407 (September 27, 2006) in the
above-captioned proceeding. The *R&O* erroneously dismissed the Joint Petitioners' Petition for
Rule Making, which was treated as a counterproposal in MB Docket No. 05-10. *R&O*, ¶ 6. The
Joint Petitioners' proposal required Station KNRQ-FM, Eugene, Oregon, licensed to Cumulus
Licensing, LLC ("Cumulus"), to change its frequency to Channel 300C at Eugene, in order to

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accommodate the proposed allotment of Station KACI-FM to Channel 250C2 at Tualatin, Oregon. Cumulus attacked the Joint Petitioners' proposal based on the potential creation of electromagnetic interference (EMI) to regional air navigation aid signals operated by the Federal Aviation Administration ("FAA"). The Media Bureau concluded that, in its opinion, Station KNRQ-FM would not obtain FAA approval to change its frequency to Channel 300C at the licensee's current licensed site and dismissed the proposal. *R&O*, ¶ 14.

The basis of the Media Bureau's dismissal is an FAA-issued "Notice of Presumed Hazard" (Emphasis added) ("Notice") obtained by Cumulus, stating that the proposal would have a negative impact on air/ground communications for the FAA Instrument Landing System (ILS) facilities located near the proposed site. According to the FAA study, the proposed use of Channel 300C at KNRQ-FM's site would cause unacceptable EMI to the Eugene, Oregon ILS. The Media Bureau treated this Notice as definitive, final and the equivalent of an adverse air hazard determination based on the height or location of a tower structure.¹

The Media Bureau decision is not based on any definitive, final judgment of the FAA, and contains material error and would set dangerous precedent. In their comments previously filed in this proceeding, the Joint Petitioners discussed the relevancy of a FAA adverse determination based on EMI. *See* Comments on Order to Show Cause, filed May 2, 2006, p. 4, note 4. *See also* Engineering Statement of Kevin Terry attached hereto. The Joint Petitioners pointed out that the issuance of such a determination by the FAA would be just a preliminary step in an involved process and that the entire matter could be resolved by having the FAA make

¹ The Commission's policy in this respect is that it generally presumes in rule making proceedings that a technically feasible site is available. However, that presumption is rebuttable in cases where there are no satisfactory sites available that would meet FAA criteria with respect to a tower. *See eg. Sebring and Miami, Florida*, 10 FCC Rcd. 6577 (MMB 1995). That policy has never been applied previously to FAA determinations based on EMI.

ILS channel changes. Portland Broadcasting, LLC ("PB") stated that it had retained the services of an FAA consultant who had identified alternate airport localizer frequencies that could be used at the Eugene airport and that PB was willing to reimburse the FAA for all of its expenses incurred in changing airport localizer frequencies. The Media Bureau ignored the Joint Petitioners' statement and rushed to judgment before giving the Joint Petitioners and the FAA a reasonable opportunity to resolve the matter satisfactorily. The Bureau had an obligation to permit the process to proceed to a final determination before issuing its decision. Instead of taking notice that the process was ongoing, it adopted its decision barely four months after the FAA issued its Notice of Presumed Hazard.

The Joint Petitioners have located alternate ILS frequencies which the FAA's is currently reviewing (110.1, 110.7, 111.5, 111.7, 111.9 and other available localizer frequencies) and the FAA has issued a Feasibility Report and requested comment (Aeronautical Study No. 2006 - ANM-1254-OE). *See Attachment.* Having already acted prematurely once, the Media Bureau should, at the very least, withdraw its Report and Order without prejudice to any action that it might take in the future based on a complete record, and wait until the FAA process reaches an end before taking further action.²

Moreover, the Bureau's reliance on the FAA determination was not only premature, but was beyond its authority. Contrary to the Bureau's conclusion, there is a very real question whether the FAA involvement in this proceeding with respect to a simple frequency change

² While the Joint Petitioners continue to negotiate with the FAA, the process is made much more difficult because of the adverse Commission decision. Cumulus has filed comments with the FAA in response to the Feasibility Report opposing the localizer frequency change, claiming that the Commission has already released a Report and Order opposing a change in frequencies and that the FAA should not get involved. Therefore, the Media Bureau relied on a tentative decision of the FAA to dismiss the Joint Petitioners' proposal and Cumulus now seeks to have the FAA rely on the Bureau *Report and Order* as a basis for not considering alternate channels. This vicious circle is as illogical and inequitable as it is improper.

should be treated the same as in previous cases where the Commission acceded to an FAA adverse air determination with respect to the height or location of a tower. This case involves a question of first impression since it is the first and only time that a rule making proposal has been dismissed because of allegations of EMI.

There is every good reason for the Commission to accede to an adverse FAA determination when it comes to tower height or location since the rule making proponent, if successful in the Commission proceeding, will need to file an application and obtain FAA approval in order to construct its station to implement the resulting rule making order. Since the FAA will play a role in reviewing the application resulting from the rule making, it makes sense to be sure that the rule making does not approve a proposal which can never be implemented. This case, however, presents a completely different set of facts. Had the Commission granted the Joint Petitioners' proposal to change the frequency for Station KRNQ-FM at its current site, Cumulus would have needed to file an application to implement the proposal but would not have needed to seek FAA consent since there would have been no physical change to its tower. Since the minor change application to implement the rule making channel change would not require FAA approval, there is no reason why FAA consent should be required at this stage of the process. Certainly, the FCC has primary jurisdiction over the rule making allotment process. The FAA has never previously been given the right to sign off on allocations. The Media Bureau decision cites no precedent for its granting the FAA a veto right over such matters.

The Media Bureau's acceptance of the FAA determination that EMI problems will occur as a result of a station's operation on Channel 300 sets dangerous precedent for all broadcasters. The ramifications of that acceptance have not been fully considered by the Bureau. In this respect it is noted that, just as the Joint Petitioners' proposal would have resulted in KNRQ-FM

changing to Channel 300, it also would have involved modifying the frequency for station KHPE-FM, Albany, Oregon, which currently operates on Channel 300, without apparent problem, to Channel 279. Fortunately, KHPE-FM did not require FAA consent to obtain its frequency; if it had required the same approval as the Media Bureau has required of the Joint Petitioners, it might never have been issued a license. However, applying the FAA Airspace Analysis program criteria to the KHPE-FM frequency results in similar EMI problems. See Engineering Statement. This points out the absurdity of relying on frequency approval by another agency when Commission-licensed stations have operated on that frequency for decades without complaint. The Joint Petitioners' proposal would have modified KHPE-FM's frequency to Channel 279, and thereby, reduced potential interference under the FAA Airspace Analysis to airport localizers at Corvallis, Newport and Eugene.

In fact, the FAA, at present, is involved in its own rule making proceeding to amend its regulations to add notification requirements and obstruction standards to address electromagnetic interference. The *R&O* grants the FAA the very power which its own rule making is presently considering. The FAA has specific authority to issue regulations requiring notice for any construction, alteration, establishment or expansion of a structure, but not how frequencies are used by equipment on that structure. Congress clearly intended that the FCC, not the FAA, be the agency to regulate spectrum use and EMI issues.³ Congress has made clear that the FCC has exclusive jurisdiction over matters dealing with radio frequency interference.⁴ Accordingly, the

³ 47 U.S.C. Sections 151, 301. See also *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F. 3d 1185, 1191 (18th Cir. 1999).

⁴ H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.A.N. at 2267 ("the exclusive jurisdiction over RFI incidents...lies with the FCC").

Media Bureau's decision to accede authority over spectrum use and EMI to the FAA is well beyond its authority and is otherwise improper.⁵

In view of the above, the Joint Petitioners' urge the Media Bureau to reconsider its action and grant the proposal filed by Joint Petitioners' in MB Docket No. 05-10, or at the least to withdraw the Report and Order without prejudice to any action that it may take in the future based on a complete record.

Respectfully Submitted.

PORTLAND BROADCASTING, LLC

By: _____

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Aaron P. Shainis
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M.S.W. COMMUNICATIONS, LLC

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EXTRA MILE MEDIA, INC.


By: _____

Dominic Monahan
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Dated: October 27, 2006

⁵ Moreover, the FAA does not make available all of its databases to the interested public; this complicates the ability of a broadcaster to engage in meaningful discussions with the FAA regarding localizer frequencies, since a broadcaster will lack all of the relevant data. There is no way to verify whether the database relied on by the FAA in reaching its determinations is accurate if access to the database is restricted. See Engineering Statement. For that reason, PB will be filing a Freedom of Information Act request with the FAA seeking access to all of its databases in making its localizer decisions. This points out another problem with respect to the FCC relying on the decisions of an agency whose decisions cannot be adequately reviewed because the data on which those decisions are based are not available for review. Basic notions of due process are violated when the Commission makes decisions based on information which is unavailable and unreviewable.

Form 7460-1 for ASN: 2006-ANM-1254-OE

Overview**Study (ASN):** 2006-ANM-1254-OE**Prior Study:** 2005-ANM-2379-OE**Status:** Determined**Letters:** Determination **Received Date:** 06/08/2006**Entered Date:** 06/08/2006**Completion Date:** 06/30/2006**Expiration Date:****Map:** [View Map](#)**Sponsor Information****Sponsor:** Portland Broadcasting, LLC**Attention Of:** Kevin Terry**Address:** 980 N. Michigan Ave.**City:** Chicago**State:** IL**Postal Code:** 60611**Country:** USA**Phone:** 801-560-9595**Fax:** 801-606-7802**Sponsor's Representative Information****Representative:****Attention Of:** Jack Chevalier**Address:** 928 V.a Panorama**City:** Palos Veredes**State:** CA**Postal Code:** 90274**Country:** US**Phone:** 310-375-2979**Fax:** 310-791-1781**Construction Info****Notice Of:** Existing**Duration:** Permanent (Months: 0 Days: 0)**Work Schedule:** 07/15/2006 to 08/15/2006**Date Built:****Structure Summary****Structure Type:** Other - with Antenna**Other Description:** FEASIBILITY STUDY**NACO Number:****FCC Number:****Structure Details****Latitude (NAD 83):** 44° 00' 07.00" N**Longitude (NAD 83):** 123° 06' 54.00" W**Datum:** NAD 83**Accuracy:****Marking/Lighting:** Red lights and paint**Other Description:****Name:** KNRQ-FM**City:** Eugene**State:** OR**Nearest Airport:** 77S**Distance to Structure:** 38561 feet**On Airport:** No**Direction to Structure:** 312.34**Traverseway:** NO**Description of Location:** Approx 8 nm SE of Mahlon Sweet Airport, Eugene, OR**Description of Proposal:** Request feasibility study; no change in location, height, ERP of 100Kw existing FM tower. FM freq change from 97.9 to 107.9. Request EMI analysis of effects on EUG & ADE localizer changes to 110.1, 110.7, 111.5, 111.7, 111.9, or other**Height and Elevation**

	Proposed	DNE	DET
Site Elevation:	1295		
Structure Height:	373	0	373
Total Height (ASML):	1668	0	1668

Frequencies

Low Freq	High Freq	Unit	ERP	Unit
107.7	108.1	MHz	100	KW

available LOC frequencies.



Federal Aviation Administration
Air Traffic Airspace Branch, ASW-520
2601 Meacham Blvd.
Fort Worth, TX 76137-0520

Aeronautical Study No.
2006-ANM-1254-OE
Prior Study No.
2005-ANM-2379-OE

Issued Date: 06/30/2006

Kevin Terry
Portland Broadcasting, LLC
980 N. Michigan Ave.
Chicago, IL 60611

**** FEASIBILITY REPORT ****

The Federal Aviation Administration has conducted a limited aeronautical review concerning the feasibility of a structure described as follows:

Structure:	Other - with Antenna FEASIBILITY STUDY
Location:	Eugene, OR
Latitude:	44-0-7.00 N NAD 83
Longitude:	. 123-6-54.00 W
Heights:	373 feet above ground level (AGL) 1668 feet above mean sea level (AMSL)

The results of this review can be found on the attached page(s).

NOTE: THE RESULTS OF OUR LIMITED REVIEW IS NOT AN OFFICIAL DETERMINATION OF FINDINGS BUT ONLY A REPORT BASED ON THE GENERAL OR ESTIMATED INFORMATION SUPPLIED FOR THE STRUCTURE. ANY FUTURE, OFFICIAL AERONAUTICAL STUDY MAY REVEAL DIFFERENT RESULTS.

If we can be of further assistance, please contact our office at (907)271-5863. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2006-ANM-1254-OE.

Signature Control No: 468676-474952

(FSB)

Robert van Haastert
Specialist

Attachment(s)
Additional Information
Frequency Data

Additional Information for ASN 2006-ANM-1254-OE

Portland Broadcasting, LLC, initiated a request for EMI analysis on their proposed 107.9 MHz/100 Kilo-Watt transmitter on EUG & ADE localizer frequencies if the the localizer frequencies were changed to 110.1, 110.7, 111.5, 111.7, 111.9, or other available localizer frequencies.

The Frequency Management and Technical Operations Branches responded: The Operations Branch, ANM-470, is commenting on the effect the proposed frequency and power output (107.9 MHz/100 Kil-Watts) located on the existing 373 AGL, FM tower at N 44d 00' 07", W 123d 06' 54" (NAD83) may have on air/ground communications for the FAA Instrument Landing System (ILS) facilities. The present study (2005-ANM-2379-OE) indicates the proponent will cause unacceptable interference to the Eugene, OR ILSs on its planned operating frequency of 107.9 MHz/100 Kilo-Watts of power.

The proponent has requested a feasibility study be done into changing the FAA's ILS frequencies to ensure no interference. This request for the FAA to change the ILS frequencies is more involved than just changing the crystals: it involves cutting tuned cables, adjusting antenna heights, changing aeronautical charts and published instrument approach procedures, and conducting flight tests. This assumes that there are frequencies available, which has not been verified.

The request for a feasibility study has been forwarded to management. Any questions regarding this issue should be directed to Fred Neudecker, Frequency Management Officer, ANM-473, (425)227-2637.

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Frequency Data for ASN 2006-ANM-1284-OE

LOW FREQUENCY	HIGH FREQUENCY	FREQUENCY UNIT	ERP	ERP UNIT
107.7	108.1	MHz	100	KW

ENGINEERING STATEMENT

In Support of a Petition for Reconsideration MB Docket 05-10

The Dalles, Tualatin, Eugene, Albany, Lebanon
Paisley and Diamond Lake, OR, and Goldendale, WA
Portland Broadcasting, LLC

Portland Broadcasting, LLC, Licensee of Station KXPC-FM, Lebanon, Oregon, Columbia Gorge Broadcasters, Inc., licensee of Station KACI-FM, The Dalles, Oregon, M.S.W. Communications, LLC, licensee of Station KMSW(FM), The Dalles, Oregon, and Extra Mile Media, Inc., licensee of Station KHPE(FM), Albany, Oregon (collectively, the "Joint Petitioners"), hereby offer the instant engineering statement in support of its Petition for Reconsideration to the *Report and Order ("R&O")* released September 6, 2006 (DA 06-1759), 71 Fed. Reg 56407 (September 27, 2006), in the above-captioned proceeding.

In 2005, the Joint Petitioners retained the services of Chevalier Aviation Associates to examine the Electromagnetic Interference, or EMI, that may be caused if the channel for radio station KNRQ(FM) Eugene, Oregon, is changed from 250C to 300C at its current antenna site. The EMI evaluations were conducted by Mr. Jack Chevalier of Chevalier Aviation Associates using the FAA's Airspace Analysis Model ("AAM") Version 5. According to Mr. Chevalier, the AAM identified that if KNRQ's frequency were changed to 107.9 MHz, the potential for EMI to the localizer at the Eugene Mahlon Sweet Field ("Eugene Airport") would exist. The same AAM identified that, *even without* KNRQ changing its frequency to 107.9 MHz, the significant potential for EMI to the localizer at not only the Eugene Airport, but also airports in Newport, OR, and Corvallis, OR, *already* exists due to the fact that KHPE(FM) currently operates on channel 300C in proximity to all three airports.

As a matter of background, in its Petition for Rulemaking (the "PRM") the Joint Petitioners requested that KNRQ(FM) have its channel changed from 250C to 300C in order for KACI(FM) relocate from The Dalles to Tualatin, OR, on channel 250C2. However, in order for KNRQ(FM) to change to channel 300C, KHPE(FM) would have to, first, change its channel from 300C to channel 279C. The AAM studies show that when KHPE(FM) changes its channel to 279C, the potential for EMI at the airports in Eugene, Corvallis, and Newport would be significantly reduced, if not

eliminated. However, as stated before, when KNRQ(FM) changes to channel 300C, the EMI reappears at the Eugene Airport.

If the frequencies for the localizers at the Eugene Airport were changed to those not be susceptible to EMI created by KNRQ(FM) operating on channel 300C, then the public interest would be served in two ways. First, the Commission's allotment priorities would be furthered in providing new first local reception service to a vast White Area and first local transmission services to Tualatin and Paisley, Oregon. Second, public aviation safety would be improved with the significant reduction or elimination of existing EMI at the Newport and Corvallis airports when KHPE(FM) changes channels from 300C to 279C. And, if changed the frequencies of the localizer at the Eugene Airport were changed, EMI would also no longer be an issue at that airport – even with KNRQ(FM) operating on channel 300C. The key to furthering the public interest is being able to change the localizer frequencies at Eugene Airport that are not susceptible to potential EMI being created when KNRQ(FM) changes channel.

At the time when the Commission issued its R&O, the Joint Petitioners and the FAA were in a healthy process of identifying new localizer frequencies for the Eugene Airport that would not be prone to potential EMI when KNRQ(FM) changes to channel 300C. Using the AAM, Mr. Chevalier identified several localizer frequencies that would not be prone to the potential EMI.¹ The Joint Petitioners, through Mr. Chevalier, requested that the FAA conduct a feasibility study to confirm the proposed substitute frequencies and/or identify alternate frequencies. The Joint Petitioners also proposed to the FAA that all expenses associated with changing localizer frequencies at Eugene Airport would be reimbursed to the FAA by the Joint Petitioners. The Commission's decision in issuing its R&O before the FAA feasibility study was complete was premature and not in the public interest since it did not allow this study to reach completion.

Unfortunately, the process of identifying substitute localizer frequencies is not a fast one. The FAA, with its limited resources and manpower, has been unable to fully explore all options available for alternate frequencies. One reason for the slow process is that the private aviation consulting community is not able to access all of the FAA's internal databases which the FAA has informed the undersigned are not available to parties other than the FAA or its private contractors. Without this

¹ Alternate frequencies offered included 110.1, 110.7, 111.5, and 111.9, although other available localizer frequencies also exist.

information, it is difficult for Chevalier Aviation Associates or any private aviation consulting firm to be able to conduct all requisite studies to identify alternate localizer frequencies and must rely on the FAA itself to conduct many studies on its own volition. The Joint Petitioners have requested that the FAA allow its engineers to meet with the FAA to help it identify duplicate, inaccurate, or outdated entries in the FCC database so that the FAA is equipped with complete information. The Joint Petitioners have also requested that the FAA allow it to consult with the FAA's own private contractors at the Joint Petitioners' expense so that public resources are not expended in this effort. Thus far, these requests have not been approved by the FAA. However, the Joint Petitioners and Mr. Chevalier continue to work with the FAA in furthering aviation safety in a manner that will make the FAA comfortable with KNRQ(FM) changing its channel to 300C, thus, allowing the Joint Petitioners to further the Commission's allotment priorities.

Respectfully submitted,



Kevin Terry
Engineer, Portland Broadcasting, LLC

September 27, 2006
2835 E 3300 S
Salt Lake City, UT 84109

Certificate of Service

I hereby certify that on this 27th day of October, 2006, true and correct copies of the foregoing Petition for Reconsideration have been served via U.S. mail, postage prepaid, upon the following persons:

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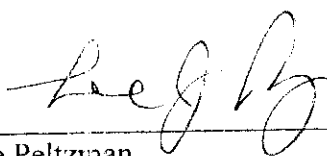
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